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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Rules and Policies Regarding)
Calling Number Identification Service)
Caller ID)
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CC Docket No. 91-281

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

To: The Commission

REPLY COMMENTS

Macro International Inc. (Macro), through counsel hereby respectfully files its Reply Comments in the above-captioned proceeding in response to the comments filed by BellSouth Corporation (BellSouth).

I. INTRODUCTION

Macro is an opinion research company that delivers high quality, research based solutions to complex problems, integrating objective information with the advisory and implementation tasks needed to improve real world performance. One of the methods Macro utilizes to obtain information for its clients is by conducting telephone surveys. The telephone surveys are conducted via telephone live operators after the numbers to be called are generated randomly by a computer, which actually initiates the call. In addition to Macro, this method is practiced by a number of other information collection entities, including political pollsters and non-profit associations. Unfortunately, due to uncertainty regarding the application of one of the Commission's rules,

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namely 47 C.F.R. 64.1601(d)(2), the use of telephone surveys by Macro and other information collection entities in a number of jurisdictions is threatened.

II. MACRO HAS STANDING TO SEEK RELIEF FROM THE COMMISSION

BellSouth, the sole opposing commenter, asserted that Macro lacked standing to seek relief because neither a controversy or uncertainty exist.¹ BellSouth argues that the Commission must strictly look to the principles of standing developed by the Article II courts because there are "no statutory or regulatory standing requirements applicable...in a declaratory ruling context."²

The Commission is completely within its authority and discretion to issue a declaratory ruling in this matter. The Commission is well aware that the doctrines of standing and ripeness developed by the federal courts do not apply to adjudications by federal administrative agencies, such as the Commission.³ The Commission has a firmly entrenched policy that allows for a good measure of "discretion" and has specifically stated that:

"Moreover, sections 4(i), 4(j), and 403 of the Communications Act confer upon the Commission broad power to issue orders appropriate for implementing and enforcing the Communications Act. In addition, section 5(e) of the Administrative Procedure Act provides that a federal administrative agency such as the Commission, "in its sound

¹ The commenter also asserts that because the requesting party is not a "telecommunications carrier" and the rule in question pertains to telecommunications carriers, the Commission "should be wary" about using its authority. Based on the lack of case law to support this contention, which would have the affect of denying non-telecommunication carriers a forum for rules that directly affect them, the requesting party does not see the need to respond beyond what is stated here.

² BellSouth Comments at 2.

³ See, e.g., *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995); *Competitive Enterprise Institute v. U.S. Dept. of Transportation*, 856 F.2d 1563, 1565 (D.C. Cir. 1988); *California Association of the Physically Handicapped v. FCC*, 778 F.2d 823, 826 (D.C. Cir. 1985); *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976).

discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." As a result, *the Commission can and does adjudicate petitions for declaratory rulings... when the requirements of the standing and ripeness doctrines are not strictly met.*"⁴

While the specific Article III doctrine of standing does not strictly apply in this context, Macro is more than able to meet all of the necessary elements. As previously asserted, Macro comes before the Commission because it has suffered specific injury in fact and risks continued exposure from the uncertainty posed by the application of one of the Commission's rules, namely 47 C.F.R. § 64.1601(d)(2). The "distinct and palpable"⁵ injury occurred with the filing of a lawsuit against Macro for violating a New Hampshire law, which provides in part that no person may use an automated dialing system or any other method of solicitation that prevents caller identification information from being transmitted.⁶ The incident was the direct result of Macro utilizing the services of an IXC, similarly situated to some LECs, that does not have the necessary blocking and unblocking capabilities.⁷

⁴ American Communications Services, MCI Telecommunications Corp. Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as Amended, *Memorandum Opinion and Order*, FCC 99-386, 14 FCC Rcd 21579 (1999) See, e.g., Operator Services Providers of America Petition for Expedited Declaratory Ruling, *Memorandum Opinion and Order*, 6 FCC Rcd 4475 (1991); Telerent Leasing Corp. Petition for Declaratory Rulings on Questions of Federal Preemption, *Memorandum Opinion and Order*, 45 FCC 2d 204 (1974), *aff'd sub nom., North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 790 (4th Cir.) cert. denied, 429 U.S. 1027 (1976) (*emphasis added*).

⁵ *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

⁶ N.H. Rev. Stat. Ann. §359-E:5 (1999).

⁷ The lawsuit was terminated pursuant to a settlement agreement.

The number or magnitude of the injury should have no bearing whatsoever on the Commission's determination as to whether an injury has occurred or relief can be granted. The Commission and the courts have recognized that the extent of the injury is "generally immaterial to the question of injury in fact; an identifiable trifle will suffice."⁸ The uncertainty and potential for repeated injury posed by multiple interpretations of Section 64.1601(d)(2) and the existence of the New Hampshire law represents a continued threat of exposure for Macro. At any given moment, Macro or other information collection entities could be the subject of a lawsuit in New Hampshire or in any other State that has a similar statutory framework.

III. REGULATORY UNCERTAINTY WARRANTS A DECLARATORY RULING

BellSouth advances the position that the discrepancies in prior Commission orders make "nothing unclear about the Commission's Part 64.1601 rules."⁹ Instead, BellSouth characterizes references to "carriers" instead of "LECs" in prior Commission orders as simply "dicta."¹⁰

A thorough review of the relevant Commission proceedings provide considerable support for multiple interpretations of Section 64.1601(d)(2). The *December 1995 Order* specifically addresses the issue of whether "carriers" that do not have SS7 call set up capability are required to make the SS7 investment.¹¹ The table of contents of the *December 1995 Order* refers to this

⁸ *General Instr. v. Nu-tek Electronics*, 197 F.3d 83, 87 (3rd Cir. 1999).

⁹ BellSouth Comments at 3.

¹⁰ *Id.*

¹¹ Rules and Policies Regarding Caller Identification Service - Caller ID, *Order and Fourth Notice of Proposed Rulemaking*, 10 FCC Rcd 13796 at para 49 (Dec. 1, 1995) (*December 1995 Order*).

and the corresponding paragraphs as "IXCS' TECHNICAL PROBLEMS."¹² The relevant paragraphs 47-51 are not dicta or opinions of the Commission, as was suggested by the BellSouth, but rather a Commission conclusion as to an interpretation of a regulation.

In an earlier Commission Order the exemption issue was addressed with reference to "carriers" in general. In the *May 1995 MO&O* the Commission again reaffirmed its position that "carriers were not required to invest in SS7 technology in order to facilitate the delivery of CPN, and were only required to deliver it where doing so was technically feasible."¹³ Of the three petitioners that had requested clarification, all were IXC's.¹⁴

The Commission responded to the petitioners by stating that "carriers 'are not required to invest in SS7 technology in order to facilitate delivery of the calling party number... "¹⁵ Therefore, the IXC's recognizing that the exemption had applied to them, had requested and received clarification from the Commission.

The LEC-specific language used in the *March 1997 Order* creates a level of uncertainty with regard to what parties that are eligible for the 64.1601(d)(2) exemption. On several occasions the *March 1997 Order* refers to the earlier *December 1995 Order* as support for the new rule that will govern LECs that do not have CLASS TM software. While the December

¹² LEC issues are specifically dealt with later in the *December 1995 Order*.

¹³ Rules and Policies Regarding Caller Identification Service - Caller ID, *Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, 10 FCC Rcd 11700, at para. 45 (May 5, 1995) (*May 1995 MO&O*).

¹⁴ The three IXC's that had filed petitions requesting clarification were Sprint, Allnet Communication Services d/b/a Frontier Communication Services, and Cable and Wireless.

¹⁵ *Id.* at para. 49.

1995 Order dealt with IXC's and LEC's separately, the *March 1997 Order* addressed the only CLASS TM software issue as it related to LEC's. At no time does the Commission specifically assert that it wished to limit the entire exemption to solely LEC's.

The Commission is well within its authority to revise the language to conform with its prior Orders. The Commission, upon learning of an inadvertent, ministerial processing error, may correct its error.¹⁶ The action would bring resolution and certainty to this issue.

IV. A DECLARATORY RULING WOULD NOT FRUSTRATE THE CALLER-ID GOALS

BellSouth warns that granting relief to Macro would seriously undermine the Commission's Caller-Id policies and goals. Furthermore, BellSouth suggests that the IXC environment has dramatically altered from four years ago when the number of IXC's that were technically unable to provide blocking and unblocking capabilities were *de minimis*.

By requesting the declaratory ruling, Macro has no intention of frustrating the Commission Caller-ID goals. The relief which Macro seeks is only to avoid the continued exposure from jurisdictions such as New Hampshire where the actions of an IXC without the technically capable software has had the result of inflicting injury to Macro and may do so in the future.

The relief that Macro seeks would pose a minimal adverse effect to the Commission's Caller-ID goals because of the "small number of access lines now lacking access" to the

¹⁶ See, e.g., *American Trucking Ass'n v. Frisco Transportation Co.*, 358 U.S. 145 (1958); *Howard Sober, Inc. v. I.C.C.*, 628 F.2d 36 (D.C. Cir. 1980); APC PCS LLC et. al., *Memorandum Opinion and Order*, 13 FCC Rcd 23570 (1998); Hazle-Tone-Communication, Inc., *Order*, 13 FCC Rcd 1547, 1551 P10 (1997).

appropriate software.¹⁷ Although the sole commenter alleges that "a large number of IXCs are delivering a significant amount of traffic... that does not contain CPN today," the only support provided to the Commission are the results of a single days worth of interexchange calls.¹⁸ The results of *one* LEC monitoring calls on a *single days'* cannot be characterized as an accurate representation of the entire carrier community with respect to the passing of CPN.

In the alternative, should the Commission conclude that a declaratory ruling is not the appropriate relief, Macro requests that the Commission grant a waiver of §64.1601. Based on the arguments set forth above, Macro firmly asserts that good cause has been shown. The waiver should provide that calls that are made on behalf of Macro that utilize an IXC that does not pass along the appropriate CPN due to the IXC's lack of the technical capability to block and unblock should be protected from state laws or regulations that would result in civil or criminal penalties. The waiver would be in the public interest because it would avoid a situation where there is a patchwork of differing state laws that have the result of frustrating the Commission's goal of having a cohesive interstate communications policy.

¹⁷ In the Matter of Rules and Policies Regarding Calling Number Identification Service - Caller ID, CC Docket 91-281, *Third Report and Order, Memorandum Opinion and Order on Further Reconsideration, and Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 3867, at para. 18 (1997).

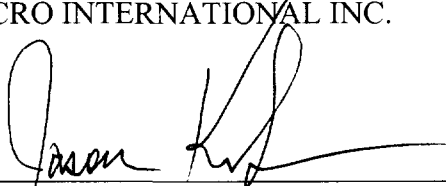
¹⁸ Bellsouth Comments at 5.

V. CONCLUSION

WHEREFORE, it is respectfully requested that the Commission ACCEPT the Reply Comments and ISSUE a Declaratory Ruling in the above-captioned matter.

Respectfully submitted,

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